SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 766

MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

vs.

CLARENCE GREEN, Trading as Green's Dairy; G. P. Julius, Trading as Julius' Dairy; JAMES SUTCLIFF, of Arnold Ice Cream Company; GEORGE M. COOPER, Trading as Quality and Service Dairy; R. E. NOGLE, Trading as Shiloh Dairy; PAUL J. BECK, Trading as Beck's Dairy; R. H. EISENHART, Trading as Eisenhart's Dairy; J. B. WARNER of Warner and Sons' Dairy; WALTER C. HOWE, Trading as Howe's Dairy; PAUL E. LANDIS, Trading as Landis Dairy; RYDER'S DAIRY, INC.; CHARLES A. HOAK, Trading as Hoak's Modern Dairy; G. B. PARTHEMORE & SONS, a Pennsylvania Corporation; LOUIS J. MALLOY, of Malloy's Dairy; H. W. ERDMAN, of Lykens Dairy; EDWARD HONICKER, Trading as Honicker's Dairy; EARL H. FETTER, Trading as Fetter's Dairy, and TITUSVILLE DAIRY PRODUCTS COMPANY, a Pennsylvania Corporation.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

BRIEF OF RESPONDENTS OPPOSING THE GRANTING OF A WRIT OF CERTIORARI.

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BRIEF OF RESPONDENTS OPPOSING THE GRANTING OF A WRIT OF CERTIORARI.

I.

Opinions Below.

The opinion and order of the Dauphin County Court of Commonwealth of Pennsylvania is reported in 48 Dauphin

County Reporter, page 385. The dissenting opinion of one judge is also reported at the same place. The opinions are found at pages 292a and 318a respectively, of the record in this Court. The opinion considered and passed upon the sole question of the interpretation and construction of words and terms employed in the Pennsylvania Milk Control Law, enacted April 28, 1937, P. L. 417.

The opinion of the Supreme Court of the Commonwealth of Pennsylvania is reported in 340 Pa. 1, 16 A. 2nd, page 9, and is found at page 463 of the record in this Court. The dissenting opinion follows in order in each instance.

The opinion of the Pennsylvania Supreme Court passed upon the sole question of proper interpretation and construction of the words and terms employed by the Pennsylvania Milk Control Law.

No constitutional or Federal question was raised, considered or passed upon by either court.

The order of the Pennsylvania Supreme Court, made November 26, 1940, denying a petition for reargument is found at page 509 of the record in this Court.

II.

Questions Presented.

Should this Court grant a Writ of Certiorari to review a decision of the Supreme Court of Pennsylvania, it being the highest Court of the Commonwealth, which passed solely upon the interpretation and construction of certain language and terms found in the Pennsylvania Milk Control Law, when such Court did not have before it and did not pass upon any Federal questions whatsoever?

III.

Statement of the Case.

This proceeding was commenced in the Dauphin County Court by the respondents (plaintiffs below) by way of a

Bill in Equity, praying the court to restrain the Milk Control Commission from proceeding criminally or civilly against them. The plaintiffs were operating as consignee agents for consignor milk producers. The plaintiffs contracted with producers to receive the producers' milk on consignment, to process and market it, and to collect for it on behalf of the producer. The contracts provided for compensation for the consignee agent milk dealer, and provided for certain sums of money to be returned to the consignor milk producer.

The plaintiffs—contending that as consignee agents for the producers, they were not within those particular provisions of the Milk Control Law which require that payments to producers for milk sold by producers to dealers shall be in accord with rates fixed by general orders of the Milk Control Commission, and which require milk dealers purchasing milk from producers to post a bond with the Milk Control Commission—did not comply with those particular provisions.

Plaintiffs contention was that they were, as consignee agents of the producers, not within the particular provisions referred to above because those provisions were, by the language of the Milk Control Law, applicable only to transactions of sale.

The Milk Control Commission took the position that the words and terms of the statute were broad enough in their meaning to cover consignee and agency transactions between a milk producer and a dealer to whom the producer might consign his milk as his agent.

The Commission threatened to proceed against the plaintiffs criminally and civilly for refusing to comply with the above requirements of the Milk Control Law.

The plaintiffs then filed their Bill in Equity raising the question of the interpretation and construction of the pertinent words and terms used in the statute.

The Milk Control Commission opposed the position taken by the plaintiffs, first by attempting to prove that the contracts were not in reality ones of consignment, but rather ones of sale. It abandoned this position later, however, and took the flat position that the statute by its words and terms was broad enough to cover the consignment transaction. (See opinion overruling exceptions, page 352 a of the record in this Court, also dissenting opinion, page 356 a.) *Neither the plaintiffs, nor the Commission, raised any constitutional or Federal question.*

The lower court interpreted the statute as not being broad enough to regulate consignee agent milk dealers and consignor milk producers insofar as transactions between themselves were concerned; and found the act not broad enough to require consignee agent milk dealers to post a bond with the Commission.

The Pennsylvania Supreme Court agreed with the interpretation and construction placed upon the statute by the respondents, and by the lower court. In its appeal to the Pennsylvania Supreme Court, the Commission did not raise a constitutional question or a Federal question in its assignments of Error, found on pages 375-399 of the record in this Court, or in its Questions Involved found at page 369 of the record in this Court.

It is a well established rule in Pennsylvania that the Supreme Court will not pass upon questions if the matter has not been assigned as error.

The Pennsylvania Supreme Court did not in its opinion consider or rule upon any constitutional or Federal question.

IV.

ARGUMENT.

I.

The highest Court of Appeals in the State has the final word on interpretation and construction of State statutes.

The sole question raised in the Pennsylvania Supreme Court was limited to the meaning of words and terms used in the Pennsylvania Milk Control Law. The Commission contended for a broader meaning than was contended for by the plaintiffs. The Pennsylvania Supreme Court in affirming the lower court did not support the Commission's contention.

The Pennsylvania Supreme Court of Pennsylvania is the highest court of the Commonwealth of Pennsylvania, and as such is the last word in declaring what a Pennsylvania statute means. All Federal courts must follow the Pennsylvania Supreme Court's interpretation and construction of a Pennsylvania statute.

Erie Railroad Co. v. *Tomkins,* 304 U. S. 64;

Ruklin v. *N. Y. Life Ins.,* 304 U. S. 202.

This Court, in the very recent case of *Fidelity Union Trust Co.* v. *Ethel Adelaide Field,* U. S. Supreme Court, Advance Opinions, Lawyer's Editions, Vol. 85, #3, page 176, speaking through Mr. Chief Justice Hughes, said at page 178:

> "The court recognized its duty to follow the law of the State and said that where that law had been determined by the state court of last resort its decision must be followed irrespective of the federal court's opinion of what the law ought to be."

"The highest state court is the final authority on state law (cases cited deleted), but it is still the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the State."

"*Here, the question was as to the construction and effect of a state statute. The federal court was not at liberty to undertake the determination of that question on its own reasoning independent of the construction and effect which the State itself accorded to its statute.* That construction and effect are shown by the judicial action through which the State interprets and applies its legislation." (Italics ours—words within parentheses supplied by us.)

There can be no doubt that the Federal courts are bound by the State law as declared by the highest State court. The interpretation and construction of a State statute is a matter solely within the province of the State courts, and when the highest State court has spoken all other courts including all Federal courts are bound by that court's opinion. This is so even though the Federal court might not agree with the logic or reasoning of Pennsylvania's highest court.

The Pennsylvania Supreme Court has previously declared this statute and its predecessor statutes constitutional. The plaintiffs below in this proceeding did not question the constitutionality of the statute.

The Commission (petitioner) now argues that since the Pennsylvania Supreme Court has interpreted the Pennsylvania Milk Control Law as it did in this case, the statute becomes unconstitutional as it violates the equal protection clause of the 14th Amendment of the United States Constitution. It contends that the opinion in this case is in conflict with the former opinions holding the statute constitutional. This is fallacious reasoning, the Commission is assuming that the Pennsylvania Supreme Court, when it

held the milk statute constitutional, also held that every action of a milk dealer and milk producer was within the purview of the statute. Such an assumption is totally unwarranted. The Pennsylvania Supreme Court in the case at bar, by interpreting and construing the statute, announced its effect from the date of its enactment. It cannot be presumed that it considered the law to be different now from what it was formerly. Hence when it passed upon the constitutionality of the statute in former decisions, it must be assumed it did so realizing the law to be as pronounced in the case at bar. The constitutionality of the statute has not been questioned, and cannot be, in this case. The constitutionality of the statute stands undisturbed.

The Commission also argues that the Pennsylvania Supreme Court's interpretation and construction of the Pennsylvania statute should have followed your Honorable Court's interpretation of the Federal Marketing Agreement Act. This is not the law as above pointed out. The Pennsylvania Supreme Court is free and unfettered when it is interpreting a Pennsylvania statute, and is not bound to interpret or construe words or phrases as the Federal court did when passing upon a Federal statute. In passing, we should like to mention that the Pennsylvania Milk Control Law and the Federal Marketing Agreement Act are worded very differently, and have different objects. It is most significant, however, that your Honorable Court, in its decision in the case of *U. S.* v. *Rock Royal Corp.*, 297 U. S. 533, held that the act left the producer and his consignee agent free to contract as they saw fit.

II.

A Federal question cannot be raised for the first time after judgment of the Pennsylvania Supreme Court.

The Commission, in its thirty-one (31) assignments of error (R. 375 to 399) filed when it took the appeal from the

Dauphin County Court did not raise a Federal question, nor did its question involved (R. 369) raise a Federal question. It merely argued in its written brief (R. 404-407) that if the Pennsylvania Supreme Court did not support the Commission's contention, the act would violate the equal protection clause of the 14th Amendment of the United States Constitution. The law of Pennsylvania is well settled that the Pennsylvania Supreme Court will pass upon only those matters raised by the assignments of error. This is true even though the questions involved and the argument attempts to raise the matter.

Pierce v. *Lehigh Valley Coal Co., Appellant, No. 1,* 232 Pa. 165 at 169;

Davis, Appellant, v. *Smith, et al.,* 262 Pa. 432;

Commonwealth, to Use, Appellant, v. *Crow, et al.,* 294 Pa. 286.

The Pennsylvania Supreme Court in the case of *Coyne* v. *John Gibbons Coal Co., Appellant,* 314 Pa. 502, speaking through the then Mr. Justice Kephart, said at page 507:

> "There is no assignment of error that raises any question as to such evidence and the questions considered must be based on the assignments."

The Commission in its petition for re-argument in paragraph 10 (R. 483-486) raised the point that the construction placed upon the statute by the Pennsylvania Supreme Court rendered the statute in violation of the United States Constitution. This was not timely. It is too late to raise a Federal question after judgment in a petition for re-argument, unless the State court considers and passes upon the question.

Angelo Herndon v. *State of Georgia,* 295 U. S. 441-455, at 442-443, the court said, speaking through Mr. Justice Sutherland:

> "On this appeal, the statute is assailed as contravening the due process clause of the Fourteenth Amend-

ment in certain designated particulars. We find it unnecessary to review the points made, since this court is without jurisdiction for the reason that no federal question was seasonably raised in the court below or passed upon by that court."

"The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. *The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it.* Texas & P. R. Co. *v.* Southern P. Co., 137 U. S. 48, 54, 34 L. Ed. 614, 617, 11 S. Ct. 10; Loeber *v.* Schroeder, 149 U. S. 580, 585, 37 L. Ed. 856, 858, 13 S. Ct. 934; Godchaux Co. *v.* Estopinal, 251 U. S. 179, 181, 64 L. Ed. 213, 214, 40 S. Ct. 116; Rooker *v.* Fidelity Trust Co., 261 U. S. 114, 117, 67 L. Ed. 556, 563, 43 S. Ct. 288; Tidal Oil Co. *v.* Flanagan, 263 U. S. 444, 454, 455, 68 L. Ed. 382, 387, 388, 44 S. Ct. 197, and cases cited." (Italics ours.)

The Commission cannot claim that it could not anticipate the construction and interpretation the Supreme Court might place upon the Act, since the pleadings and arguments dealt with nothing else. The lower court first made the interpretation and construction, and this was the sole matter upon which the Commission rested its appeal to the Supreme Court of Pennsylvania. The Commission, therefore, cannot claim to come under the exception to the rule which would permit the raising now of the Federal question, since to come under this exception, the Pennsylvania Supreme Court would have had to construe the act in an unanticipated manner, threatening rights under the Constitution. Here it was not only anticipated, but was the sole subject of controversy. This court has held that an appellant must anticipate that a court might do what was done in another case, and not anticipating it does not save it from the general rule.

In *Angelo Herndon* v. *State of Georgia*, 295 U. S. 441-455, at 446, this Court further said:

> "Appellant, of course, cannot plead ignorance of the ruling in the Carr Case, and was therefore bound to anticipate the probability of a similar ruling in his own case, and preserve his right to a review here by appropriate action upon the original hearing in the court below. It follows that his contention that he raised the federal question at the first opportunity is without substance, and the appeal must be dismissed for want of jurisdiction."

The Commission is attempting to raise a Federal question now by saying that since the Pennsylvania Supreme Court did not support its contention, the act is in violation of the United States Constitution. This position can find no support. The Milk Control Law of Pennsylvania has repeatedly been declared constitutional and at no time has the Pennsylvania Supreme Court held otherwise.

Rohrer v. *Milk Control Board*, 322 Pa. 257, 186 A, 336;
Eisenberg Farm Prod. v. *Milk Control Board*, 332 Pa. 34, 200 A. 854;
Colteryahn Sanitary Dairy v. *Milk Control Commission*, 332 Pa. 15, 1 A (2d) 775;
Harrisburg Dairies, Inc. v. *Eisaman, et al.*, 338 Pa. 58, 11 A (2d) 875.

The Commission cannot by this indirect method attack its constitutionality, nor can the Commission by this very novel argument establish jurisdiction in the United States Supreme Court, when the only question the Pennsylvania Supreme Court passed upon was to declare the breadth and effect of a Pennsylvania statute.

Petitioner, relying upon *Minnesota* v. *National Tea Co.*, 309 U. S. 551, asks this court to review the judgment of the Supreme Court of Pennsylvania.

But that case is only an authority controlling the disposition of cases where "there is considerable uncertainty as to the precise grounds for the decision" and where it is not clear whether the court placed its decision on State or Federal constitutional grounds.

It does not have any application to those cases where the decision is based upon a non-Federal ground adequate to support it.

Fox Films Corp. v. *Muller*, 296 U. S. 207;
Bell Tel. Co. v. *Van Dyke*, 296 U. S. 533.

In the case at bar the opinion is clear and concise, and is based solely upon a non-Federal ground clearly adequate to support it. This we submit is obvious from the following portion of the opinion of the Supreme Court of Pennsylvania (R. 464, 340 Pa. 1, 2) wherein Mr. Chief Justice Schaffer, speaking for the majority said:

> "The principle guiding to decision is this: The power and authority to be exercised by administrative commissions must be conferred by legislative language clear and unmistakable. A doubtful power does not exist. Such tribunals are extra judicial. They should act within the strict and exact limits defined: Citizens Passenger Ry. Co. *v.* Public Service Com., 271 Pa. 39, 114 A. 642; Swarthmore Borough *v.* Public Service Com., 277 Pa. 472, 121 A. 488; Blue Mountain Cons. Water Co. *v.* Public Service Com., 125 Pa. Superior Ct. 1, 189 A. 545; State Board of Milk Control *v.* Richman Ice Cream Co., 117 N. J. Equity 296, 175 A 796. With the principle stated before us, turning to the law embodying the powers of the Milk Control Commission, we find nothing said about milk shipped to dealers on consignment. It speaks of the "purchase" of milk by dealers, its "delivery and sale" to them; it uses the words "buy", "purchase", "prices", "bought or sold", "sell or buy." The words "consign" or "consignment" nowhere appear. We are asked by the Commonwealth

to interpolate these words into the Act. This we cannot do without violating the important principle to which we have adverted. If the legislature desires to change the law, this can shortly be demonstrated by an amendment at the coming session, writing into the Act a provision covering milk sent to dealers on consignment."

We respectfully submit that there can be no question but that the Supreme Court of Pennsylvania placed its decision squarely on the fact that the power and authority asserted by the petitioner commission had not been conferred by legislative language clear and unmistakable—a necessary requisite to such power. *This is an adequate non-Federal ground supporting the decision of the Supreme Court of Pennsylvania.*

Petitioner in its brief advances many arguments which need not be discussed, for they are directed at the wisdom of the majority decision of the Supreme Court of Pennsylvania. But this decision being on a subject within the province of that court is binding on this Court.

Conclusion.

We respectfully submit that the petition should be denied at the cost of petitioner.

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